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United States Court of Appeals for Veterans Claims

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Vet.App. No. 15-2817

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RICHARD E. MCGINNIS,

*Appellant,*

v.

ROBERT A. MCDONALD,  
Secretary of Veterans Affairs,

*Appellee.*

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REPLY BRIEF FOR APPELLANT

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## **PRELIMINARY STATEMENT**

In Mr. McGinnis's principal brief, he argued that the Board provided an inadequate statement of reasons or bases, in violation of 38 U.S.C. § 7104(d)(1), because it did not address why Mr. McGinnis was not afforded a VA medical examination to determine whether or not he suffers from Parkinson's disease under 38 U.S.C. § 5103A(d)(2). Appellant's Brief (Br.) at 4-7. In his brief, the Secretary maintains that any error is harmless and that the Board's decision should be affirmed. Secretary's Br. at 9-13. For the reasons that follow, the Court should reject the Secretary's argument and remand the Board's decision.

## **ARGUMENT**

### **THE BOARD'S FAILURE TO ADDRESS THE NEED FOR A VA MEDICAL EXAMINATION TO DETERMINE WHETHER OR NOT MR. MCGINNIS SUFFERS FROM PARKINSON'S DISEASE IS PREJUDICIAL.**

At the onset, the Court should take note that the Secretary concedes that the Board did not discuss the need to acquire a VA medical opinion to rule out Parkinson's disease, and that this failure was likely erroneous. Specifically, the Secretary states:

The Secretary *concedes* that the Board did not specifically discuss whether an examination was needed on this claim; however, *any error on the part of the Board as to this lack of discussion is harmless*. See 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009).

Secretary's Br. at 9 (emphasis added).<sup>1</sup> As a result, the only question before the Court is whether or not the Board's failure to address this issue is prejudicial.

Mr. McGinnis submits that the prejudice in this case is evident. Administrative error by the Board is prejudicial where it deprives a claimant of a "meaningful opportunity" to advance his claim. *Overton v. Nicholson*, 20 Vet.App. 427, 435 (2006). Here, because the Board did not explore the need to rule out Parkinson's disease, it denied Mr. McGinnis the opportunity to advance his claim in a couple of ways. First, as argued in his principal brief the Board's refusal to address this issue denied Mr. McGinnis the possibility of utilizing presumptive service connection to advance his case. Appellant's Br. at 7; 38 U.S.C. § 1116; 38 C.F.R. §§ 3.307(a)(6), 3.309(e) (2015) (listing Parkinson's disease as one for which presumptive service connection is available based on herbicide exposure). Second, the Board's decision to remand for an evaluation of cervical dystonia, without confirming the absence of Parkinson's disease, risks the loss of Appellant's effective date. *Tyrues v. Shinseki*, 23 Vet. App. 178, 193-95 (2009) (Lance, J., dissenting) (noting that VA's ability to bifurcate claims could cause unwitting veterans to lose their right to appeal and potential effective dates).

The Secretary attempts to obscure this harm by arguing that the evidence is stacked against a finding that Mr. McGinnis has Parkinson's disease. Secretary's Br. at

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<sup>1</sup> Appellant notes that the Secretary, immediately before his concession, also states: "Here, because there was no competent evidence of a diagnosis of Parkinson's disease, the Secretary's duty to provide a medical examination related to this claim was not triggered." Secretary's Br. at 9. However, it is crystal clear that the provision of a medical opinion requires symptoms not a diagnosis. *McLendon v. Nicholson*, 20 Vet.App. 79, 81-86 (2006). As a result, the Court should give more weight to the Secretary's clear concession of error.

12. Specifically, he argues that the medical evidence of record only shows a diagnosis of cervical dystonia, whereas Mr. McGinnis has only offered up evidence demonstrating a potential overlap between cervical dystonia and Parkinson's disease, without an actual diagnosis in his case. *Id.* This argument must fail. It conflates the weight of evidence necessary to win service connection with the evidence necessary for VA to provide further development. Under 38 U.S.C. § 5103A, VA is mandated to "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim." Furthermore, VA is obligated to sympathetically develop a veteran's claim to its optimum. *Golz v. Shinseki*, 590 F.3d 1317, 1323 (Fed. Cir. 2010). As a result, if there is any possibility that there might be an overlap in symptoms between two disabilities, VA should attempt to affirmatively rule one disability out. Therefore, it is clear that the Board's failure to address the need to rule out or confirm Parkinson's disease cost Mr. McGinnis an opportunity to advance his claim, and remand is appropriate. *See Overton, supra.*

### **CONCLUSION**

For the foregoing reasons, and reasons advanced in Appellant's principal brief, the Court should vacate the Board's May 4, 2015, decision and remand this case to the Board with instructions that it provide an adequate statement of reasons or bases.

Respectfully submitted,

August 11, 2016

/s/ Patrick A. Berkshire

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